

In the Matter of Debra Johnson,
Department of Health and Senior Services
DOP Docket No. 2004-802
(Merit System Board, decided March 10, 2004)

Debra Johnson, a Legal Specialist with the Department of Health and Senior Services (DH&SS), appeals the attached determination of the Commissioner of DH&SS, stating that there was probable cause to substantiate a finding that the appellant violated the New Jersey State Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace (State Policy).

In a letter dated August 20, 2003, DH&SS informed the appellant that its Equal Employment Opportunity and Affirmative Action Unit (EEO/AA) had conducted an investigation into allegations of violations of the State Policy filed by Legal Specialist Michael Kennedy and Research Scientist Eric Lieberman.¹ At the time, the appellant was functioning as the Director of the Office of Legal and Regulatory Affairs.² The EEO/AA's investigation substantiated Kennedy's and Lieberman's claims that the appellant engaged in conduct that violated the State Policy and that on numerous occasions she exhibited unprofessional behavior and demonstrated extremely poor judgment for a senior manager. Specifically, the EEO/AA found that the appellant made demeaning remarks about an individual's religion, made comments about not wanting to hire employees married with children, and requested that a "good looking male intern" be hired. Additionally, the EEO/AA determined that the appellant referred to staff by derogatory and demeaning names, such as "retard" and "moron," created an intimidating environment by making threats to terminate a subordinate's employment, created expectations of gift giving and attendance at parties, pitted employees against each other, made inappropriate comments about other employees' attire, and publicly embarrassed staff. Based on these findings, it was determined that the appellant would be reassigned within DH&SS and required to attend training regarding the State Policy. Finally, the August 20, 2003 letter noted that the appellant's reassignment was a lateral move and was neither a demotion nor a promotion.

On appeal to the Merit System Board (Board), the appellant argues that the process leading to the DH&SS Commissioner's determination violated the State Policy. In this regard, the appellant contends that contrary to State Policy and practices, the Commissioner met with her staff before a complaint was filed. The appellant alleges that the circumstances

¹ At the time the complaint was filed, Lieberman held the title of Legal Specialist.

² It is noted that the appellant's position is in the unclassified service.

surrounding this meeting instigated, if not solicited, the filing of discrimination complaints. Additionally, the appellant asserts that she was removed from her office without an opportunity to defend herself and that this removal was initiated to publicly humiliate her. The appellant claims that she knows of no other instances where such actions were taken against DH&SS supervisors accused of discrimination by subordinates. Further, the appellant alleges that someone in authority asked to have the EEO/AA report changed to further incriminate and degrade her.

In addition, the appellant denies the allegations that she violated the State Policy. Specifically, the appellant claims that at no time did she demean anyone's religion or take any action on the basis of any employee's religion. Additionally, the appellant states that she has never considered marital or parental status in the conduct of her office and has, in fact, hired and requested salary increases for several married employees with families. The appellant also asserts that she approved the appointment of the sole male intern without ever having seen him. Further, the appellant admits that she may have made statements such as, "Don't be a moron, let the secretary copy that," or "make a decision, do not be such a chicken." However, she claims that she did not yell at anyone and she believed that she had a comfortable working relationship with her staff, and that they understood her attempts to inject light humor into a very busy office environment. Moreover, the appellant claims that she never threatened to terminate an employee, and that the closest she ever came to such a statement was to comment that the Commissioner would not be pleased if something did not get done. The appellant also contends that the attorneys in question were familiar with the State system and knew that she could not simply fire them without presenting a reasonable rationale to the Commissioner. Furthermore, the appellant claims that attendance at office parties and gift giving were completely voluntary and she never pitted employees against each other, never made inappropriate comments on anyone's attire and did not shout at staff or publicly embarrass them. Finally, the appellant contends that with the exception of the allegations concerning an employee's religion, marital status or parental status, even if the other allegations were true, they would not implicate the State Policy.

In response, DH&SS, represented by Laurie M. Hodian, SDAG, submits a detailed response to the appellant's allegations in support of its determination. Initially, DH&SS states that on May 6, 2003, three attorneys from the Office of Legal and Regulatory Affairs met with the Commissioner of DH&SS to report an alleged hostile and intimidating work environment created by their supervisor, the appellant. Because some of the allegations raised seemed to implicate the State Policy, the matter was referred to DH&SS EEO/AA for investigation. The EEO/AA interviewed the two

complainants, Kennedy and Lieberman, and the appellant, along with 22 witnesses, which included all of the witnesses named by the appellant.

In his interview, Kennedy alleged that the appellant regularly engaged in name-calling, referring to him as “baby,” “retard,” “stupid,” “idiot,” and “holdover.” Additionally, Kennedy claimed that the appellant threatened to terminate him and told him that there was no political reason to give him a raise. Further, Kennedy alleged the following: the appellant expected gifts and attendance at office parties; the appellant made inappropriate remarks concerning national origin, religion, dress, gender, familial status, and marital status; the appellant commented that Puerto Rican and Italian men dress well and that he must not be a true Italian; the appellant stated that he was no longer the best looking man on the floor since a better looking man had just been hired; and the appellant stated that she would never again hire anyone planning to have children.

In his interview, Lieberman claimed that the appellant called him such names as “idiot,” “retard,” “chicken,” and “evil.” Additionally, Lieberman asserted that the appellant threatened his job and told him that he made her sick. Further, he contended that the appellant stated that he and the Commissioner of DH&SS were a “different kind of Jew.” Lieberman also alleged the following: that the appellant stated that in the future she would not hire people with children; the appellant commented to him that it was “very problematic” when he had to take three hours off to care for his sick infant son; and the appellant suggested that he hire a good looking male intern because there were not enough good looking men in the building. Finally, both Kennedy and Lieberman claimed that the appellant pitted employees against each other and publicly embarrassed employees in meetings with co-workers.

During the EEO/AA’s investigation, the appellant admitted to stating that she would not hire employees with children out of frustration. The EEO/AA determined that this statement was a violation of the State Policy. Additionally, the EEO/AA found that witnesses corroborated Kennedy’s and Lieberman’s allegations that the appellant stated that Kennedy was no longer the best looking man on the floor since a better looking man had just been hired, and that the appellant stated that Lieberman hire a good looking male intern because there were not enough good looking men in the building. The EEO/AA determined that these two statements violated the State Policy. Witnesses also corroborated Kennedy’s and Lieberman’s allegations of name-calling by the appellant, which also implicated the State Policy. Further, the EEO/AA found Lieberman’s allegations that the appellant made derogatory comments about his religious affiliation were substantiated. Witnesses recalled Lieberman discussing the comments and the appellant

acknowledged discussing the Jewish religion on two separate occasions, but denied making derogatory comments. Moreover, while the EEO/AA could not substantiate the comment concerning the attire of Puerto Rican and Italian men, it did substantiate that the appellant made other comments about employees' attire. However, the EEO/AA determined that the comments on employees' attire were not a violation of the State Policy, but constituted inappropriate behavior for a manager.

In addition, the EEO/AA found that the allegations that the appellant threatened to terminate employees were corroborated by several witnesses. This conduct was inappropriate but was not found to implicate the State Policy. Similarly, the allegations concerning gift giving and office parties were also substantiated but did not implicate the State Policy. Further, the EEO/AA concluded that the allegations that the appellant mischaracterized conversations and pitted employees against each other were substantiated by witnesses but did not violate the State Policy. However, the EEO/AA found that the substantiated actions, which did not violate the State Policy, exhibited poor judgment, unprofessionalism and extremely inappropriate behavior by the appellant in dealing with her subordinate staff.

The EEO/AA also determined, although not noted in the determination letter, that the appellant violated the confidentiality provisions of the State Policy. In support of this contention, it submitted a letter from the appellant to the Commissioner of DH&SS dated July 10, 2003, indicating that the appellant discussed the EEO/AA's investigation with co-workers. Specifically, in this letter the appellant described details of the EEO/AA's investigation to the Commissioner of DH&SS, including the names of the complainants, and also stated that "[t]he affirmative action officer's questions I understand are going far a field. For example, recently she asked a member of senior staff if I am prone to mood swings?" The EEO/AA asserts that the appellant was aware of the confidentiality provision and provides a copy of a memorandum signed and dated May 9, 2003 by the appellant, which outlines the State Policy's confidentiality provision. Additionally, the appointing authority contends that it did not violate the State Policy in the manner in which it investigated the claims made against the appellant. Finally, it argues that while the appellant may attribute her comments to her sense of humor, the comments violate the State Policy, especially since they were directed to subordinates from a member of the senior executive staff.

In reply, the appellant asserts that she did tell Lieberman that she believed that he and the Commissioner of DH&SS were from different branches of the Jewish religion and did state to Lieberman that she felt he was trying to ingratiate himself with the Commissioner and to stop this behavior. However, the appellant claims that these statements were not

demeaning or derogatory. Additionally, the appellant claims that she never took any adverse employment action or practice which treated employees with children less favorably than other employees. In this regard, the appellant acknowledges that she expressed frustration with her secretary about her attendance problems but that she never took any action to discriminate against individuals with families. Further, the appellant does not recall if she made the statement to Kennedy that he was the nicest looking man on the floor until a new hire came but contends that, even if she did make the statement, it does not implicate the State Policy. The appellant also reiterates her previous contention that she did not instruct Lieberman to hire a good looking male intern. Moreover, the appellant acknowledged that she may have called her staff certain insensitive names but she did not yell at anyone in a demeaning manner. The appellant adds that she did not purposefully use these words against men only and that this “name calling” did not violate the State Policy. The appellant also contends that she did not violate the confidentiality policy. She asserts that all her July 10, 2003 letter proves is that when 22 people are interviewed, someone is bound to call her to find out what is going on and tell her what they know. Furthermore, the appellant submits numerous copies of e-mails between her and her staff to illustrate the relationship she had with them and as examples of how she interacted with her subordinates. Finally, the appellant requests a copy of the investigation report.

CONCLUSION

Initially, the Board notes that a copy of the investigation report is required only in circumstances where the appointing authority fails to provide a detailed description of the investigation conducted, witnesses interviewed, and conclusions reached so as to render it impossible for the Board to make an informed determination of the issues in question. *See In the Matter of Theresa Lockette* (MSB, decided May 7, 2003). In the instant matter, a detailed response was submitted by the appointing authority which adequately described the EEO/AA’s investigation into the allegations against the appellant. Therefore, a copy of the actual investigation report is not required in the instant matter.

The Board has conducted a review of the record in this matter and finds that the appointing authority properly concluded that the appellant engaged in behavior which constituted a violation of the State Policy. The record also shows that the EEO/AA conducted an adequate investigation. It interviewed the relevant parties in this matter and appropriately analyzed available documents in investigating the complaints filed by Kennedy and Lieberman. Specifically, the EEO/AA investigation interviewed the

complainants, the appellant, and 22 witnesses including all those indicated by the appellant. The EEO/AA determined that the appellant's statements demeaning Lieberman's religion, her inappropriate remarks about not wanting to hire employees with children, and her gender-based comments about wanting to hire good looking males or commenting on the looks of males in the office were all substantiated by witnesses and constituted violations of the State Policy. The appellant argues that while some of her statements may have been insensitive and some were an attempt to inject humor into the workplace, none of the statements implicate the State Policy. The Board disagrees. Clearly, making subordinates uncomfortable and fearful for their employment based on statements regarding religion, familial status or gender, violates the State Policy. The appellant's intentions when she uttered the statements are irrelevant.

Additionally, the EEO/AA determined that the other allegations against the appellant were also substantiated but that they did not implicate the State Policy. The Board agrees with the EEO/AA's assessment that the other allegations did not implicate the State Policy but that they did demonstrate poor judgment, unprofessionalism and extremely inappropriate behavior by the appellant in dealing with her subordinate staff. Further, the EEO/AA has provided evidence that the appellant violated the State Policy's confidentiality provision.³ Moreover, other than her mere contentions, the appellant has not provided any evidence that the EEO/AA's investigation was not thorough and complete or that its conclusions were in error. The only evidence submitted by the appellant was a series of e-mails between her and her subordinate staff. However, such e-mails did not indicate whether or not the allegations filed against the appellant were true, and were only submitted to show her relationship with her staff and her demeanor with them in those particular e-mails. Accordingly, the appointing authority's investigation was thorough and impartial, and sufficient basis exists to find a violation of the New Jersey State Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace.

A final comment is warranted in this matter. The Board is concerned with DH&SS' "punishment" in this matter. Rather than institute disciplinary action against the appellant, it merely reassigned her and provided additional training. Clearly, the violations of the State Policy sustained in this matter could have merited a significantly more severe penalty, including, but not limited to, a demotion from the supervisory ranks

³ The appellant's July 10, 2003 letter to the Commissioner of DH&SS described the EEO/AA investigation, including the name of the complainants to the Commissioner of DH&SS and it referenced a conversation with a senior staff member about questions being asked by the affirmative action officer. These disclosures clearly violate the confidentiality provision found in *N.J.A.C. 4A:7-3.2(m)*.

or a disciplinary suspension.⁴ The Board questions whether the “penalty” provided by the DH&SS sufficiently indicated to the appellant the seriousness of her actions. Nevertheless, the Board will not substitute its judgment for that of the DH&SS in this particular case.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

⁴ In this regard, the Board notes that the appellant is an unclassified employee and was not appointed via a formal testing procedure, and may be disciplined for inappropriate conduct, up to and including removal, without the same protections afforded career service employees. *See e.g., N.J.S.A. 11A:2-6 and N.J.A.C. 4A:2-1.1 et seq.*